93-40

No.

Supreme Court, U.S.
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In The Supreme Court of The United States
Spring Term, 1993

John J. Scinto, Petitioner Pro Se

v.

R. David Stamm,etal
Respondents

Petition for Writ of Certiorari to
The Supreme Court of Connecticut

Respectfully submitted

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD NOW SETTLE THE CONFLICT THAT EXISTS AMONG THE VARIOUS STATE COURTS AND THE FEDERAL COURTS OF APPEALS ON THE APPLICATION OF THE MATHEWS v. ELDRIDGE DUE PROCESS BALANCING TEST TO BAR APPLICANTS

II. WHETHER THIS COURT SHOULD NOW SETTLE THE CONFLICT BETWEEN THOSE COURTS AND THIS COURT OVER THE SAME ISSUE

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JURISDICTION

The balancing test favors the Petitioner in this case, and he comes to this Court because his motion for rehearing (reargument and reconsideration en banc) was denied on March 4, 1993. The final judgment of the Connecticut Supreme Court had been published on February 9, 1993. The Petitioner's motion for reargument followed timely on February 16, and his addendum on Feb. 19, still timely

The jurisdiction of this Court is invoked under 28 USC 1257 (3).

For further analysis of jurisdiction please see the Statement of the Case.

STATEMENT OF THE CASE

The judgment and the balancing test I seek to have reviewed are the denial by the Connecticut Supreme Court, the highest state court in Connecticut, of my motion for reargument and reconsideration and addendum, and the previous affirmance of the Defendants-Respondents' motion for summary judgment.

The Petitioner, a citizen of the United States, filed an application and petition to the Superior Court in Connecticut claiming gross negligence in the grading of his bar exam of July, 1989, in that he "obviously deserved" many more points on the exam. He alleged that at least one grader gave him the additional 1/2 raw score point he needed to pass the overall bar exam under the contested scoring system. He also alleged that the grading system is obviously and grossly arbitrary and capricious in that it

precludes graders from giving a grade of minimal competency or barely passing on any essay answers, although the exam purports to test minimal competency. Mandatory fractional grading and other grossly arbitrary and capricious grading methods were also used. Thus, he alleged that his substantive and procedural due rights of property and liberty were infringed upon under the 5th and 14th amendments of the United States Constitution.

The Petitioner also submitted as evidence (not timely objected to) his essay answers, the questions, sample answers published by the committee, his scoresheets, and regulations. All of it was subject to judicial notice, and none of it was timely objected to. Furthermore, the Defendants' attorney alleged that she did not know whether there were any model answers during the hearing of October 9, 1990. It turns out that there are model answers. They were allu-

ded to in the opinion of this case at pages 529, 533, 536; and I have not been given a copy of them.

The Petitioner first raised the federal questions in his application and petition to the Superior Court on February 23, 1990. He then put these allegations into his designation of contents of record filed with the Connecticut Appellate Court on February2, 1992. That included his complaint, the decisions, memoranda, evidence, and other documents. Then he referred to all of these documents in his appellate brief of March 9, 1992. Furthermore, he alleged the same grading procedures violated the same due process rights of other bar applicants. He asked the Superior Court for a hearing on his essay examination, for his admission to the bar, for a declaration that the bar exam rules were contrary to due process and therefore unconstitutional; and for

a rule that graders be allowed to grade each essay answer as minimally competent or barely passing if they so decide.

Moreover, the Petitioner asked the Defendants for an administrative hearing.

On December 5, 1990 Judge Thim of the Superior Court ruled that there was jurisdiction for a judicial hearing on the grading of the Petitioner's bar exam, and that the declaratory judgment part of the suit would be postponed until after a hearing on the grading of the Petitioner's exam.

Next, the Petitioner made a motion to add his bar exam of February 1990 to the complaint. The Defendants made a stipulated agreement to the effect, and Superior Court Judge Nigro ruled to the same effect, namely that the February claim would be added to the complaint without the need for an amendment, and that the Defendants' motion to dismiss would

apply to it also. This is evidenced on page 9 of the transcript of October 9, 1990. Next, the Defendants' answer of December 17, 1990 failed to address the Petitioner's February 1990 exam, and thereby admitted that he had passed it.

The Petitioner then filed a motion for summary judgment on January 3, 1991. He had filed his affidavit on July 20, 1990. The Defendants made a cross motion for summary judgment on January 30, 1991 with affidavit.

After two letters and several phone calls, and after a 6 month's wait, on February 19, 1991 the Petitioner received the transcript of the August 20, 1990 hearing. It was replete with error, and therefore the Petitioner made motions for corrections and for the deposition of the court reporter. Judge Thim denied them on September 19, 1991 but ruled that the Petitioner's memo-

randum in opposition to dismiss would suffice as court evidence. This is also a precedent for allowing my complete case file to become the printed record on appeal.

During the hearing of November 4, 1991 on the Defendants' cross motion for summary judgment, I stated that many lawyers in Connecticut passed the bar exam by having sufficiently high essay scores to offset their failing national multistate scores, at page 28 of the transcript. Since the Defendants did not object, my allegation was admitted as judicial evidence. I also stated that I had passed the national exam 4 times.

During the December 2, 1991 hearing Superior Court Judge McGrath admitted to knowing of informal bar exam hearings in Connecticut. That was a party's judicial admission since the Superior Court judges

are defendants in this case as principals of their agent, the bar examining committee. The Defendants' attorney also made this judicial admission since he did not object to it or deny it.

Judge McGrath then granted the Defendants' cross motion for summary judgment because of a lack of subject matter jurisdiction. As a matter of law this was improper, since granting a motion to dismiss is the proper way to deny jurisdiction. Furthermore, Judge Thim had already denied the motion to dismiss, and had acknowledged jurisdiction for a judicial hearing on my bar exam.

The Petitioner appealed to the Appellate Court of Connecticut, and soon after the Defendants moved to transfer the the appeal to the highest state court, and the motion was granted. The Petitioner specifically raised the issue

of the Defendants' failure to answer his allegations of passing the February 1990 bar exam. He also specifically raised the issue of whether the summary judgment was erroneous, including the sub-issues of error in the light of several jurisdictional citations, the Defendants' admission of jurisdiction in the November 4, 1991 hearing, and a state history of informal bar exam hearings.

There have been several disputes of fact in this case, the most egregious of which were the dispute over whether a grade of 1.5 raw score points indicates that two different graders differed from each other by 100%; whether a grade of 1 (in a grading scale of 0 - 7) is gross misgrading of a correct answer; Hooban v. Bd. of Govs., 85 Wash. 2d, 774(1975) admonishes against extremely low grades; whether a grading system that precludes giving a minimal competency grade (3.6) on each essay question is gross negli-

gence since only whole number grades are allowed.

Defendant Stamm's affidavit which states that there is an average Connecticut passing grade on the multistate exam, is inconsistent with his prior statement in the same affidavit that there is no such thing as a passing grade on the multistate exam. This renders his testimony disputable and impeachable.

Another genuine dispute over a material fact is the computation error in the Petitioner's February 1990 scoresheet which was filed in the Superior Court on November 11, 1991 and a copy of which was handed to Judge McGrath on December 2, 1991.

In this suit the entire case file is the printed record on appeal since Presiding Justice Callahan agreedto that at page 4 of the Supreme Court transcript of November 5, 1992.

ARGUMENT I

The balancing test of Mathews v. Eldridge, 424 US 319 (1976) has been misapplied in Scinto v. Stamm, 224 Conn. 524, 535, 536 (1993) which states that there is sufficient procedural due process in the unlimited reexamination provided for admission to the bar. However, unrepresented review is not due process. Schware v. Bd of Bar Ex of NM, 353 US 232 (1957).

Under the first prong of the test the strong private interest is admitted in the last paragraph of page 535.

The model answers alluded to in the second paragraph of page 536 were never turned over to me though I sought them in the hearing of October 9, 1990.

At page 537, the top paragraph, the opinion says that the loss of anonymity of the applicant in a grading hearing

would have an effect. However, judges are capable of handling that. Besides, anonymity can be lost when a grader recognizes an applicant's handwriting or style of expression, and thereby knows that the applicant is a repeater on the bar exam.

As for the lack of a calibration meeting, a judge could compare the answer at issue with the sample answers published by the committee, and he could judge them from his knowledge and experience. Making judgments on bar exam answers is very similar to the type of professional work a judge does almost every day. I have submitted the sample answers into evidence.

At the bottom of page 537 of the opinion in my case, Tyler v. Vickery, 517 F2d 1089 (1975, CA5) states that assuming that 1 of 100 applicants fails the bar exam because of arbitrary grading, the chance of that happening twice is

1 in a million. This is pure speculation. In my case, on the February 1990 scoresheet there is an obvious computation error which has never been acknowledged by the committee. Furthermore, relative to this exam the committee published a letter admitting erroneous grading by 2 graders. The 1 in a million speculation pales in comparison to this evidence.

ARGUMENT II

At the bottom of page 537, the court also says there is just one exception to the courts disallowing judicial regrading and that was Richardson v. Mc Fadden, 54 F2d 744 (1976). However, In re DeOrsey, 112 RI 537 (1973) regraded and passed 7 applicants in Rhode Island. Cupples v. Watson, 92 App DC 166 (1953) regraded in DC. And re Admission of Thorne, 635 P2d 22, 23 (1981, UT) regraded in Utah. I submit that the

conflict arising with the courts that do not grant jurisdiction for judicial hearings on regrading bar exams should be resolved in favor of judicial hearings.

At page 538 of the opinion in my case the court admits to bar examination judicial hearings jurisdiction for manifest unfairness. Hooban, supra; DeOrsey, supra at543; Barde v. Bd of Trustees,207 Conn 59,64 (1988). My case comes within this manifest unfairness jurisdiction because I alleged it in different words in my Superior Court complaint, and in my briefs to the Connecticut Supreme Court. Moreover, the gross misgrading practices delineated supra state a case of manifest unfairness.

ARGUMENT III

The following are more jurisdictions granting bar examination hearings:
Woodward v. Va. BBE, 420 FS 214 (1976,Va)
In re Mead, 361 NE 2d 403 (1977, Mass.)

App of Peterson, 459 P2d 703 (1969, AK)

Bowens v. Bd Law Ex, 291 SE2d 170, 172 (1982, NC App)

Loeb v. NY, 144 App Div 2d 813 (1988,NY)

Feldman v. BLE, 438 F2d 699 (1971,AR)

Bailey v. Bd Law Ex, 508 F Supp 106, 109 (TX 1980)

In re Reardon, 378 A2d 614 (1977, DE)

ARGUMENT IV

I submit that a right to a bar exam judicial hearing obviously makes the entire grading process more fair and just, and is a most important additional safeguard in the Mathews balancing test.

Furthermore, Zinermon v. Burch, 494 US 113 (1990) holds that predeprivation hearings must be given by the state where feasible. But otherwise, postdeprivation hearings are always required.

Citing Mathews and the balancing

test, the following cases give postdeprivation hearings under due process:

Gutzwiller v. Fenik, 860 F2d 1317 (6 Cir, 1988)

Dell Fargo v. San Juan Bautista, 857 F2d 638 (9 Cir, 1988)

Campo v. NYC Retire. Sys., 843 F2d 96 (2d Cir, 1988)

Dell Fargo also holds that gross negligence states a claim . Gutzwiller also holds that discrimination states a claim here.

The Scinto v. Stamm opinion speculates as to the expense on the judicial system because there might be a flood of bar exam petitions. Though this may be evidence of wide scale dissatisfaction with the bar exam system, it is based on mere speculation, not on reliable cost-benefit analysis. An indication that these fears are false is the fact that

after the February 1983 bar exam only 11 applicants even asked to see their essay answers.

The opinion in my case concludes that a bar examjudicial hearing for the purpose of regrading is not constitutionally required under Mathews, and thus the trial court properly granted the Defendants' motion for summary judgment. I submit that this is incorrect.

The only mention of the pre- versus post- deprivation hearing distinction in the entire report is made in the dissent, at page 541, top of the second paragraph, a "postermination hearing by a board." That would harmonize with Mathews which gave a postdeprivation hearing. I ask for the same.

Mathews denied only a predeprivation hearing. That is not at issue in my case. Mathews' postdeprivation judicial hearing satisfies the due process requirement of

5th and 14th amendments. See Mathews, supra at 332, 339, 349.

Some Connecticut cited supra which grant bar exam judicial type hearings are: In re Dinan, Fld Cty Bar v. Esterman, In re Griffith, Heiberger v. Clark, and Mrotek v. Nair.

ARGUMENT V

Regulation 5(e), which is promulgated by the bar examining committee in its instructional letters, has facial validity but it has been applied in a grossly arbitrary manner in grading my contested answers, I submit. It states: "The applicant's conclusion need not be in accord with the law of the State of Connecticut, but the applicant must demonstrate an ability to analyze and solve the legal problems involved."

This means that all minority holdings are of equal status in applying the

law to the question. Thus, if a grader is unsure as to whether he or she is reading an answer based on error or on some little known minority law, and he or she grades harshly on that answer because it differs from most or all of the other answers, he or she is grading in a grossly arbitrary manner. Such was the case with question # 11 of my July 1989 bar exam on which I correctly applied a small minority rule, the Rule in Shelley's Case. None of the sample answers mentioned it. I received a 1 out of a possible 7.

ARGUMENT VI

I submit that the Defendants have not met the rational relationship test. When grading is grossly arbitrary as has been delineated supra, there is no rational relationship between the grading of a bar exam and the choosing of de-

serving applicants. The following is a summary of those arguments based upon evidence: the 1.5 grade; the 1 out of 7; 3.6 for a passing grade; a barring of minimal competency grading on the essays; computational errors; a committee letter admitting erroneous grading. Schware v. Bd of Bar Ex, 353 US 232, 238-240 (1957).

ARGUMENT VII

There is even evidence that the choice of the practice of law is a fundamental right. In re Griffiths, 413 US 717 (1973) cites Truax v. Raich, 239 US 33, 35 (1915) holding that the right to the choice of occupations "is the very essence of personal freedom."

"...The practice of law should be considered a fundamental right." The Supreme Court Of New Hampshire v. Pi-

per, 470 US 274, 283 (1985).

In Zauderer v. Office of Discipline, Superior Court of Ohio, 471 US 626 (1985) the plaintiff was accorded the fundamental right to advertise his law practice under the First Amendment. His case received strict scrutiny.

In conclusion, I ask this Court to remand this case with instructions to grant a full judicial hearing on the grading of my two contested exams, or to remand with a suggestion that they admit me to their bar.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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